IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

O.J.APPEAL No. 191 of 2007
In
OFFICIAL LIQUDATOR REPORT No. 105 of 2007
In
COMPANY PETITION No. 140 of 2006
with
CIVIL APPLICATION No. 296 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE M.S.SHAH
AND
HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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R.J. PAPER MILLS PVT. LTD. - Appellant(s)
Versus
O.L. OF SUPERIOR SOX LTD. & 8 - Opponent(s)

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Appearance :
MR AJAY R MEHTA for Appellant(s) : 1,
OFFICIAL LIQUIDATOR for Opponent(s) : 1,
MR INDRAVADAN PARMAR for Opponent(s) : 2,
NOTICE SERVED BY DS for Opponent(s) : 3,
None for Opponent(s) : 4 - 9.

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CORAM : HONOURABLE MR.JUSTICE M.S.SHAH
and
HONOURABLE MR.JUSTICE K.A.PUJ

Date : 29/08/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE M.S.SHAH)

This appeal is directed against the order dated 25.07.2007 of the learned Company Judge in Official Liquidator Report No.105 of 2007 in Company Petition No.140 of 2006.

2. M/s. Superior Sox Ltd. was ordered to be wound up by the Company Court by judgment dated 13.11.2006 in Company Petition No.140 of 2006. This Company Petition arose from the opinion dated 13.06.2006 recorded by the Board of Industrial and Financial Reconstruction (BIFR) under sub-section (1) of Section 20 of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred as “SICA”) opining that it was just, equitable and in public interest that the Company was not likely to become viable in future and hence M/s. Superior Sox Ltd. should be wound up. This opinion was recorded after observing that the promoters of the Company were not serious in rehabilitating the Company nor were they resourceful enough to mobilize the funds required for that purpose. BIFR further observed in the said opinion that “with a view to expediting further process”, BIFR appointed IDBI as Selling Agent to dispose of the properties of the Company in terms of Section 20(4) of the Act and to deposit the sale proceeds (after deducting expenses) with the concerned High Court. Apart from directing that the sale be made within six months after public advertisement and through Asset Sale Committee comprising of secured creditors and the Company and after imposing other usual safeguards, BIFR finally directed through para 3.5 of the minutes of the proceedings held on 13.6.2006 as under :-

> "3.5 The Bench further directed that the concerned High Court shall be kept duly informed of the steps initiated by the Board under Section 20(4) of the Act for disposal of the assets of the sick industrial company and the fact that the sale proceeds shall be got forwarded to them in due course after the sale of the said assets had been completed."

The said opinion was forwarded by BIFR to the Company Court on 08.08.2006 with copies of the relevant proceedings for further necessary action. The opinion was accordingly numbered as Company Petition No.140 of 2006. By order dated 21.08.2006, the learned Company Judge issued notice to all the concerned parties including the secured creditors i.e. IDBI and Vijaya Bank and to other parties. No opposition was lodged against winding up of the Company. IDBI, which was the operating agency before BIFR, also appeared and had no objection to the Company being wound up. The learned Company Judge accordingly by judgment dated 13.11.2006 ordered that the Company be wound up. The Official Liquidator attached to this Court was appointed as Official Liquidator for the Company and was called upon to take possession of the property (movable and immovable) to the Company along with Bank account, cash and account books. Since BIFR had earlier passed the order dated 13.6.2006 directing IDBI, a secured creditor and the operating agency, to take over the possession of the assets and to sell the properties of the Company, the learned Judge also gave the following directions:-

> "If IDBI as Secured Creditor has taken over possession of all the assets of the Company and had taken any steps to sell the properties of the Company

> (in liquidation) pursuant to the direction issued by the BIFR, in that case the Official Liquidator is directed to see that the amount realised by the IDBI by selling the properties of the company (in liqn.) be deposited with the Official Liquidator in the account of the Company (in liqn.) and submit the report before this Court accordingly. If possession of any of the properties of the Company (in liqn.) is not taken over by IDBI pursuant to the order passed by the BIFR, in that case the Official Liquidator to take possession of the properties immediately and submit a report before this Court."
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> (emphasis supplied)

3. The Official Liquidator sent communication dated 09.02.2007 to IDBI giving intimation that possession of the properties of the Company will be taken over by the Official Liquidator on the basis of the above directions of the High Court. It was thereafter on 15.2.2007 that IDBI pointed out to the Official Liquidator that sale of the assets of the Company was conducted by IDBI. The Official Liquidator took over possession of the assets of the Company on 16.2.2007.

4. The relevant chronology is under :-

(i) At the hearing held on 13.06.2006, BIFR entrusted the responsibility for disposal of the Company's assets under sub-section (4) of Section 20 to the IDBI and for that purpose constituted the Asset Sale Committee comprising of IDBI, Vijaya Bank and the Company, that sale of the assets be made by public sale within six months and after notice through advertisement.

(ii) IDBI took over possession of the assets of the Company on 15.07.2006 and deployed the security agency for the assets of the Company with effect from 15.07.2006.

(iii) IDBI got valuation of the assets done by an approved valuer and as per the valuation report, the market value and distress sale value of the assets were assessed at Rs.173.41 lacs and Rs.138.73 lacs (including stock worth Rs.1.60 lacs) respectively. The land admeasuring 11,905 sq. mtrs. in a well developed industrial area of Morai near Vapi on the National Highway No. 8 (between Surat and Bombay) was valued at Rs.53.57 lacs (market value) and Rs.42.85 lacs (distress value). IDBI brought the above valuation to the notice of BIFR at the hearing held on 16.10.2006. BIFR approved the reserve price at Rs.138.73 lacs for inviting offers for purchase of assets of the Company.

(iv) Public notice dated 12.01.2007 for sale of the assets of the Company including the above land was released in two news papers. In response to the public notice, seven bids were received, the highest bid of Rs.140 lacs was made by three parties. A public auction was held on 01.02.2007. At the inter-se bidding only two parties took part and the highest offer of Rs.146 lacs was made by the present appellant. The Asset Sale Committee accepted the said offer and EMD of other bidders

was returned. These proceedings including the auction were conducted by an agency called Armedas Consultant Pvt. Ltd. to whom the IDBI had entrusted the auction sale.

(v) By letter dated 08.02.2007, IDBI informed BIFR about the completion of sale process and pursuant thereto at the meeting held on 25.04.2007, BIFR permitted IDBI (operating agency) to sell the assets of the Company at Rs.146 lacs to the present appellant.

5. It is contended by Mr. Ajay Mehta, learned advocate for the appellant that in view of the above proceedings and in light of the provisions of sub-section (4) of Section 20 of the Act read with Section 32 of the SICA, the learned Company Judge erred in passing the impugned order directing the Official Liquidator to issue a fresh advertisement and to conduct the sale de novo. Strong reliance is placed on the decision of the Rajasthan High Court in Union of India Vs. Krishna Mills Ltd. 81 Company Cases (1994) Page-50 in support of the contention that the provisions of SICA override the provisions of the Companies Act.

Mr Mehta has further submitted that the appellant has deposited full consideration by the end of March 2007, that nobody has challenged the order of BIFR and that there are no workmen who have come forward contending that the sale in favour of the appellant would be adverse to their interest.

6. Mr. Indravadan Parmar, learned advocate appearing for the IDBI has supported the appellant and has submitted that IDBI had merely carried out the directions of BIFR under the provisions of SICA.

7. Mr.J.S.Yadav, learned advocate for the Official Liquidator has supported the order of the learned Company Judge under appeal and has submitted that once the winding up order came to be passed by the Company Court on 13.11.2006, thereafter IDBI or any other party could not have conducted any sale proceedings for sale of assets of the Company in liquidation and that any prior orders passed by BIFR under sub-section (4) of Section 20 would not enure beyond the date of passing of the winding up order by the learned Company Judge. Strong reliance is placed on the decision of Karnataka High Court in Karnataka State Industrial Investment and Development Corporation Ltd. Vs. Intermodel Transport Technology Systems (Karnataka) Ltd. (in liquidation) reported in 94 Company Cases (1998) Page 166.

Mr. Yadav has further pointed out that even after the learned Company Judge passed the order dated 13.11.2006 for winding up of the Company, IDBI did not bring it to the notice of BIFR and that it was after the Official Liquidator intimated to IDBI that the Official Liquidator was going to take over the possession of the properties of the Company pursuant to the directions of the Company Court that IDBI for the first time informed the Official Liquidator on 15.2.2007 about the sale proceedings conducted till then and accepted

the sale consideration thereafter (Rs.22.63 lacs on 20.2.2007 and Rs.109.50 lacs on 28.3.2007).

8. On an analysis of the relevant provisions of the Companies Act, 1956 and the Sick Industrial Companies (Special Provisions) Act 1985, the following propositions emerge:-

(a) Under the provisions of the Companies Act, 1956, the Company Court is given the discretion to pass orders for winding up on any one or more grounds specified in Section 433 including the ground of inability to pay its debts and/or that it is just and equitable that the Company should be wound up. Once the Company Court passes the order for winding up, under Section 449 the Official Liquidator shall, by virtue of his office, become the Liquidator of the Company, with all the powers and functions, provided in Sections 451 to 481 of the Companies Act. Thus, under the Companies Act, it is only the Liquidator attached to the concerned High Court who can take all the necessary steps in the matter of winding up of the Company including sale of its assets and distribution of the sale proceeds to the creditors, workers and contributories, subject to the directions of the Company Court, under Sections 529, 529A, 530 and other relevant provisions of the Companies Act.

(b) SICA has been enacted to see that a sick industrial Company, unable to pay its debts and unable to make its net worth positive on its own, may be able to revive and rehabilitate itself so that it continues to utilize fully its

productive industrial assets, its workmen get maximum protection of employment and the funds of banks and financial institutions are put to optimum use. This can be done only with the protective umbrella of BIFR (u/s. 20 SICA) and with the remedial measures to be provided by BIFR (under Secs. 18 and 19 of SICA).

(c) When BIFR sees reasonable possibility of such revival, it appoints an operating agency under Section 17(3) to prepare a scheme for revival in accordance with the provisions of Section 18. While on the one hand, Section 22A(a) empowers the BIFR to restrain the sick industrial company from disposing of, except with the consent of BIFR, any of its assets during the period of preparation or consideration of the Scheme under Section 18, on the other hand, Section 18 specifically confers upon BIFR the power to sanction a scheme involving sale of some or all assets of the Company to another entity as a part of such scheme and sub-section (11) of Section 18 also provides that where the whole of the undertaking of the sick industrial company is sold under a sanctioned scheme, the Board may distribute the sale proceeds to the parties entitled thereto in accordance with the provisions of Sections 529A and other provisions of the Companies Act, 1956.

(d) In order to deal with the obvious conflict which is bound to arise if on the one hand BIFR were to endeavour to help the sick industrial Company to revive and rehabilitate itself and on the other hand the Company Court were to pass an order for winding up and to take

steps for winding up of the same Company under the Companies Act, the non obstante clause in Section 22 (notwithstanding anything contained in the Companies Act, 1956) and the provisions of Section 32 of SICA step in to give overriding effect to SICA over the Companies Act. This is also clear from the provisions of the Companies (Amendment) Act, 2002 for establishing National Company Law Tribunal which is vested both with the powers of BIFR as well as of the Company Court, but these amendments are not yet brought into force.

(e) But when BIFR forms the opinion that there is no reasonable possibility of the Company being in a position to revive itself, and forwards its opinion to the concerned High Court under Section 20(1) that the sick company is not likely to become viable in future and that it is just and equitable that the Company should be wound up, there would be no conflict because after the Company Court passes order of winding up the sick company under sub-section (2) of Section 20 SICA, the Company Court "may proceed and cause to proceed with winding up of the sick industrial company in accordance with the provisions of the Companies Act, 1956".

(f) While Section 449 of Companies Act provides for appointment of Official Liquidator attached to the High Court as Liquidator of the Company ordered to be wound up, sub-section (3) of Section 20 confers upon the High Court option to appoint an officer of the Operating Agency (earlier appointed by BIFR to prepare a scheme

for revival and rehabilitation of the Company) as the Liquidator of the Company with all the powers of the Official Liquidator under the Companies Act (of course, such appointment of the officer is to be made with the consent of the employer – Operating Agency).

(g) Once BIFR forms the opinion under Section 20(1) that the Company should be wound up, the provisions of sub-sections (2) and (3) of Section 20 would begin to operate and only the High Court would have remained in the picture and BIFR would have become functus officio. However, sub-section (4) provides that notwithstanding anything contained in sub-sections (2) and (3), BIFR may cause to be sold the assets of the Sick Industrial Company and forward the sale proceeds to the High Court for distribution in accordance with the provisions of the Companies Act.

(h) The object of conferring this power on BIFR and also the scope of this power become obvious. Since the proceedings before the High Court do often take considerable time before the winding up order is passed, and the ultimate aim of the winding up proceedings is to sell off the assets of the Company to pay off the dues of creditors and workmen under Sections 529, 529A and 530 and then to pay other creditors and contributories if there is any surplus, sub-section (4) of Section 20 opens with a non obstante clause for permitting BIFR, (even after it forms and forwards to the High Court its opinion that the sick Company should be wound up), to get the assets of the Company sold so that the sale proceeds

may be deposited with the Liquidator to be appointed by the High Court, who will then distribute the same amongst creditors and workmen of the Company as aforesaid. Sub-section (4) is, therefore, enacted only to expedite the process of sale of the assets of the sick Company during the period between the date BIFR forms and forwards its opinion to the High Court under Section 20(1) and the date when the High Court passes the order for winding up under Section 20(2) of the SICA.

(i) Even during pendency of such BIFR opinion before the High Court, the agency appointed by BIFR under Section 20(4) SICA must keep the concerned High Court duly informed of the steps being taken under Section 20(4) for disposal of the assets of the Company. Suppose after receiving BIFR opinion for winding up, there is a genuine bonafide attempt by the promoters with the help of any other party to revive the Company or there is a genuine bonafide scheme presented before the High Court for revival of the Company after take over, the High Court is not deprived of its discretionary power not to order winding up of the sick industrial company, but to sanction the scheme in an appropriate case. In such a case, the Company Court may interdict the sale of assets by BIFR. In other words, while prior leave of the High Court is not necessary for sale of assets of the sick Company under Section 20(4) during pendency of BIFR opinion before the High Court, the High Court still has the power to interdict such sale in case of a contingency such as indicated above.

(j) However, sub-section (4) of Section 20 does not and is not intended to denude the Company Court of its powers and responsibilities under the Companies Act after passing of the winding up order. That is why the non obstante clause in sub-section (4) merely says "notwithstanding anything contained in sub-sections (2) and (3) (of Section 20)", unlike the non obstante clause in Section 22, which says "notwithstanding anything contained in the Companies Act, 1956". If the Legislature had intended sub-section (4) to operate even after passing of the order for winding up, it would have also added the words "and notwithstanding anything contained in the provisions of the Companies Act, 1956".

Clause (b) of Section 22A of the SICA also buttresses the interpretation being placed by us because this provision empowers BIFR to restrain the sick industrial company from disposing of its assets, except with the consent of BIFR, "during the period beginning with the recording of opinion by the Board for winding up of the company under sub-section (1) of section 20 and up to commencement of the proceedings relating to the winding up before the concerned High Court".

(k) The provisions of sub-section (4) of Section 20 empowering BIFR to get the assets of the industrial company sold cannot continue to operate after the winding up order is passed by the concerned High Court under sub-section (2) of Section 20 of the SICA. Even if an officer of the operating agency appointed by BIFR is

> also appointed by the High Court as the Liquidator of the Company under sub-section (3) of Section 20 of the SICA, he will be deemed to be, and have all the powers of, the Official Liquidator under the Companies Act, for the purposes of winding up of that Company, but he will not be treated as exercising powers under sub-section (4) of Section 20 of the SICA.

9. In the facts of the present case, though IDBI was appointed by BIFR as the operating agency for the Company, when the winding up order came to be passed by the learned Company Judge, IDBI or its officer was not appointed as the liquidator, but the Official Liquidator attached to this Court was appointed as the Official Liquidator for the Company. Hence, IDBI was not acting and was not supposed to act in the dual capacity of Official Liquidator – cum – operating agency as contemplated by sub-section (3) of Section 20 of the SICA. What has aggravated the situation in the present case is that though IDBI was entrusted with the task of selling the assets of the Company as per the directions of BIFR at the meeting held on 13.06.2006 under Section 20(4) SICA, till 13.11.2006 when the learned Company Judge passed the order for winding up of the Company, IDBI had not done anything except taking over possession of the assets of the Company. Though IDBI was very much present before the Company Court when the winding up order came to be passed on 13.11.2006, IDBI did not care to point out that the assets of the Company were not sold and that even a public notice inviting offers was not issued. Even the public notice dated 12.01.2007 did not point out that the Company Court had passed the winding up order. Thus, IDBI had purported to

exercise the powers as if no winding up order was passed. IDBI even violated the direction in para 3.5 of the minutes of BIFR proceedings held on 13.6.2006 that "the concerned High Court shall be kept duly informed of the steps initiated by the Board under Section 20(4) of the Act for disposal of the assets of the sick industrial company ... ...". The entire proceedings conducted by IDBI after 13.11.2006 must, therefore, be treated as null and void ab-initio.

10. While issuing notice in this appeal, we had passed specific order on 13.08.2007 calling upon IDBI to file affidavit along with all other details about the steps taken for sale of the properties of the Company and also to state specifically whether the fact about the winding up order having been passed by the learned Company Judge was brought to the notice of BIFR at any stage. Though affidavit dated 23.08.2007 has been filed by the Deputy General Manager of IDBI, there is nothing on record to show that between 13.11.2006 and 28.03.2007, IDBI invited the attention of BIFR to the fact that the Company was already ordered to be wound up by order dated 13.11.2006 of the Company Court.

11. It is also strange that even though the winding up order was passed by the Company Court on 13.11.2006, the Official Liquidator attached to this Court took no steps whatsoever till 08.02.2007 and it was only after IDBI conducted the sale through another agency on 01.02.2007 and informed the BIFR on 08.02.2007 about the sale and sought approval of BIFR to the sale in favour of the appellant and that only thereafter, the Official Liquidator on the very next date writes a letter to IDBI intimating his intention to take over the possession of the

assets of the Company.

12. In the aforesaid set of circumstances and the above legal position, we have no hesitation in confirming the order of the learned Company Judge by which the Official Liquidator has been directed to issue fresh public notice inviting bids for purchase of the assets of the Company at reserve price of Rs.150 lacs.

The learned advocate for the Official Liquidator states that the advertisement has already been published on 14.08.2007 and that today is the last date for receiving the bids and tomorrow the auction will be conducted. In this view of the matter, there is all the more reason not to interfere with the order of the learned Company Judge. We may also note that an officer of Vijaya Bank had appeared before this Court on the first returnable date i.e. 22.08.2007, but no representation is made on behalf of Vijaya Bank till today. Since both the secured creditors are in the public sector - IDBI is a Public Financial Institution and Vijaya Bank is a nationalized bank - we have shown a little more concern even in absence of any opposition as such to the sale earlier proposed by IDBI in favour of the appellant.

13. The appeal is accordingly dismissed.

Since the appeal is dismissed, Civil Application for stay is also disposed of accordingly.

[M.S.SHAH, J.]

[K.A.PUJ, J.]

mrpandya*